MOHAMED MUSTAFA A/L A. NALLA IBRAHIM & ANOR.

v.

SYED MOHAMED A/L MADAR RAWTHER

HIGH COURT MALAYA, PULAU PINANG
TUAN JEFFREY TAN JC
[CIVIL SUIT NO. 22-323-94]
7 DECEMBER 1994

INJUNCTION: *Ex-parte injunction obtained by plaintiffs restraining defendants and/or defendant's servant/agents from stopping/hindering entry of plaintiffs into premises - Defendant served with injunction - Application obtained ex-parte with return date - Time span and status of ex-parte injunction - Defendant failed to attend inter partes hearing - Order 29 r. 1(2B) of Rules of the High Court 1980 (Rules of High Court (Amendment) (no. 2) 1993 - Whether Court could proceed with hearing inter partes in the absence of defendant.*

On 12 November 1994, the High Court, Pulau Pinang granted to the plaintiffs,

a) an *ex-parte* injunction restraining the defendant and or the defendant's servants or agents from stopping or hindering in any manner whatsoever the entry of the plaintiffs and/or those permitted by the plaintiffs, into premises known as 38-C, Queen Street, Pulau Pinang; and

b) fixed 19 November 1993 for hearing *inter partes* of the plaintiffs' application for an injunction to restrain the defendant and/or the defendant's servants or agents from stopping or hindering in any manner whatsoever the entry of the plaintiffs and or those permitted by the plaintiffs, into premises known as 38-C, Queen Street, Pulau Pinang until the disposal of the action; and

c) directed the service (i) of all documents relating to(a) above, and (ii) notice of the hearing fixed for 19 November 1994 on the defendant.

The plaintiffs complied with item(c) of the said *inter partes* application but despite the opportunity given to the defendant to contest, the defendant failed to attend the *inter partes* hearing on 19 November 1994.

Held:

[1] An applicant at the hearing *ex-parte* is to obtain a return date within the 14 days of the *ex-parte* injunction for both parties to be heard, and thereafter effect service and notice of hearing on the adverse party with celerity. Upon service and notice, the suspended application will be heard under rule (1) despite the subsistence of an injunction obtained *ex-parte*.

[2] An adverse party accorded notice is expected to attend the hearing *inter partes*, for failure to attend is at considerable risk the hearing proceeding in his absence, nevertheless, for under r. 1(1) the Court may, if it thinks it expedient to do so, deal with, adjudicate upon and dispose of the application in like manner as for other judicial hearings where one party is served and therefore required to attend, but is absent.

[3] Accordingly, the Court proceeded with the hearing of the plaintiffs' application under r. 1(1) granted the said inter locutory injunction restraining the defendant as in (b) of the *inter*

partes application until the disposal of the action or until further order of Court, and with liberty to the defendant to apply.

[Interlocutory injunction granted to plaintiff in absence of defendant]

Cases referred to:
Permodolan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors. [1988] 1 MLJ 178 ***(refd)***
Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd. [1984] 2 MLJ 143 ***(refd)***
Wah Loong (Jelapang) Tin Mines Sdn. Bhd. v. Chin Nyen Yiok [1975] 2 MLJ 109 p. 111 ***(refd)***
Khoo Cheng Tat v. Lim Soon Teik [1982] 1 MLJ 289 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 29 rr. 1 (1), (2), (2A), (2Af)

Other source referred to:
Spry on Equitable Remedies 3rd Edn.

For the plaintiffs - Kanesan a/l Mutusami (Noor Nazrin Noor Khamar with him); M/s. Tawfek Badjenid & Partners
For the defendant - absent

JUDGMENT

Jeffrey Tan JC:
On the plaintiff's *ex-parte* application heard on 12 November 1994 the Court:

(a) granted to the plaintiffs, an injunction restraining the defendant and/or the defendant's servants or agents from stopping or hindering in any manner whatsoever the entry of the plaintiffs and/or those permitted by the plaintiffs, into premises known as 38-C, Queen Street, Pulau Pinang until the disposal of the action, and,

(c) directed the service (i) of all documents relating to (a) above, and (ii) notice of the hearing fixed for 19 November 1994, on the defendant.

The defendant was duly served with the documents relating to the injunction obtained *ex-parte* and notified of the *inter partes* hearing, but despite the opportunity to contest, failed to attend the *inter partes* hearing on 19 November 1994.

This grounds of judgment is written, not so much as to expatiate the law relating to injunctions, but to explain the Court's reception of applications *ex-parte* and *inter partes* with the advent of O. 29 r. 1 (2B) of the Rules of the High Court 1980 which reads:

> Unless sooner revoked or set aside, an interim injunction obtained on an *ex-parte* application shall automatically lapse at the end of 2 weeks from the date on which it was obtained.

Sub rule 1(2B) being an *absoluta sententia expositore non indiget* plainly and resolutely provides that an injunction obtained *ex-parte* if not sooner revoked or set aside will automatically lapse. In the absence of any provisions extant for renewal or extension it will be fully spent after 14 days from the date of its grant. This 14 days term is set and rigid and repeated applications will be futile gambits, for the requirement in O. 29 r. 1(2Af) for a disclosure of **any** previous similar *ex-parte* applications by an applicant, is to alert the Court to any such abuse of process, unless fresh grounds are relied on. Even conjecture or construction that a lapsed injunction can metamorphose in character or form or take on new life cannot be admitted, for r. 1(2B) *in claris non est locus conjecturis* lacks the ambiguity for any such or other departure.

The primary rule regulating applications for injunctions is O. 29 r. 1(1), while sub rules 1(2), 1(2A) and 1(2B) are supplementary sub rules accommodating a special situation; while an application for an injunction under O. 29 r. 1(1) is heard *inter partes*, an *ex-parte* application under sub rule 1(2) is applied *ex-parte* in a case of an urgency (see *Permodolan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors.* [1988] 1 MLJ 178). The term *ex-parte* in sub rr. 1(2), 1(2A) and 1(2B) denotes an application for which only an applicant will be heard with no requirement of any notice being given to the party adversely interested.

As a departure from the r. 1(1), an *ex parte* application under r. 1(2) is restricted fittingly to urgent cases, such as:

(i) of some imminent danger to property
(ii) where the refusal of an injunction will expose the suit to irreparable injury or defeat the very purpose for which the action has been brought, and
(iii) other compelling circumstances, where the plaintiff cannot wait or afford notice to be given and for the application to be heard *inter partes*, and
(iv) where it is genuinely impossible to give notice without defeating the purpose of the application (see *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 MLJ 143).

It is therefore indubitable that an injunction granted *ex-parte* in urgent cases, is designed and intended as a preventive remedy for the preservation of the *status quo*, but solely on the facts and arguments presented by only one side, until:

(i) such time as the applicant can give notice of his application for a temporary injunction to the other side, and,
(ii) the application is heard with arguments and facts presented from both sides or there is an answer or contest to the application;

In limiting its time span, r. 1(2B) is declaratory of the status of *ex-parte* injunctions in the pantheon of injunctions, namely as a stop gap and crisis measure to neutralize the exigencies pleaded by the applicant, to keep things "on hold" until such time as an applicant can haul a wrongdoer to Court. The 14 days is therefore allotted for service and notice on the adverse party and for arguments from both parties to be heard whilst the *status quo* is temporarily being maintained.

Nevertheless *ex-parte* or *inter partes*, "an injunction remains a discretionary remedy granted at the discretion of the Court on the basis of the principles of equity and on a consideration of the facts, circumstances and legal consideration" (see *Wah Loong (Jelapang) Tin Mines Sdn. Bhd. v. Chin Nyen Yiok* [1975] 2 MLJ 109 at 111) and all applications for preventive relief proceed on common ground for the preservation of the *status quo* until trial.

A restraining order lapsing before the determination of rights or the disposal of the action therefore will not fulfill nor answer the *raison d'etre* of injunctive orders, for an injunction dissolving just ahead of the final disposal of the action in effect clears the passage for the arrival of the very circumstance or occurrence feared, and rendering thus the very purpose of the action impotent. An *ex-parte* injunction is therefore of limited application and cannot be solely relied upon for the preservation of the *status quo*, but serves only as a temporary refuge for an applicant in an awkward predicament, when notice cannot be given or afforded to be given, and yet there can be no hearing *inter partes* unless prior notice was given.

The particular differentiating and then shunting an application as one under r.1(1) and not under r.1(2) is therefore service and notice (see *Khoo Cheng Tat v. Lim Soon Teik* [1982] 1 MLJ 289 at 290) rather than of substance. When notice of hearing is given, an application is heard *inter partes* under r.1(1), but otherwise it will be heard *ex-parte* under r. 1(2), *albeit* as a further distinctive feature, an application *ex-parte* must now contain a clear and concise statement of the grounds of urgency.

The purpose of an interlocutory injunction is primarily for the preservation of the *status quo* pending trial, for it is inconceivable that any application for an interlocutory injunction proceeds on a restricted footing for the preservation of the *status quo* but ending prematurely before the action could be adjudicated upon. **Spry on Equitable Remedies** 3rd Edition defines an interlocutory injunction as directed to ensure that particular defined acts do not take place or continue to take place pending the final determination by the Court of the rights of the parties. An injunction under r. 1(2) but certain to lapse after 14 days, therefore addresses in part an application for an interlocutory injunction; the primary application under r. 1(1) not addressed in full, will therefore be suspended and held in abeyance until service and notice by the applicant of the hearing *inter partes.*

An applicant at the hearing *ex-parte* is to obtain a return date within the 14 days of the *ex-parte* injunction for both parties to be heard, and thereafter effect service and notice of hearing on the adverse party with celerity. Upon service and notice, the suspended application will be heard under r. 1(1) despite the subsistence of an injunction obtained *ex-parte.* At this hearing, the Court will be competent to address the application to its fullest extent and grant the interlocutory injunction up to but not beyond the final hearing of the proceedings quite without the term restraint of r. 1(2B).

The grounds relied on in the application *inter partes* ought *ex neccesitate* be the same as the application *ex-parte,* and as such a fresh application under r.1(1) is surplusage; the same papers relied on in the application *ex-parte* are therefore that to be served and that to be relied on, at the hearing *inter partes.*

An adverse party accorded notice is expected to attend the hearing *inter partes,* for failure to attend is at considerable risk of the hearing proceeding nevertheless, for under r. 1(1) the Court may if it thinks it expedient to do so, deal with, adjudicate upon and dispose of the application in like manner as for other judicial hearings where one party is served and therefore required to attend, but is absent.

The disregard neglect or absence of an adverse party will not hinder an application under r. 1(1) for an applicant is not to be rendered hapless by the recalcitrance of another. Rule1(2B) is not to be construed nor surmised as requiring the attendance of an adverse party preceding the grant of an interlocutory injunction under r. 1(1), for otherwise the very purpose and rationale of interlocutory and interim injunctions, as preventive remedies will be undermined. The attendance or absence of an adverse party is beyond an applicant's control, but rights to be heard are not fastened nor contingent upon the presence or resistance of another.

Accordingly, the Court proceeded with the hearing of the plaintiffs' application and under r. 1(1), granted the said interlocutory injunction restraining the defendant as in (b) above until the disposal of the action or until further order of Court, and with liberty to the defendant to apply.